In the

Supreme Court of the United States

January Term, 1978

No. 77-1180

ANTHONY P. LaFATCH,
Petitioner,

v.

MM CORPORATION,
Respondent,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 16, 1978

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The petitioner, Anthony P. LaFatch, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 2, 1977.

OPINIONS BELOW

The opinions of the Court of Appeals, which are not reported, appear in the Appendix. The opinion of the District Court for the Southern District of Ohio, which was not reported, also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 2, 1977. A timely suggestion for rehearing *en banc* was denied, with dissenting opinion, on November 18, 1977 and this petition was filed within 90 days of that date. This Court's judgment is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

When a state court of competent jurisdiction has rendered a final judgment on the merits on certain claims between two persons, and when those same persons and claims are subsequently brought before a federal district court, must that court give full faith and credit to the state court judgment and apply the doctrine of res judicata of the state rendering the judgment in disposing of those same claims pursuant to United States Constitution, Article 4, §1 and 28 U.S.C. §1738?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Annotated, Article 4:

§1. Full faith and credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of

every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof. U.S.C.A., at 357 (1968).

United States Code, Title 28:

§1738. The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF CASE

Jurisdiction in the District Court for the Southern District of Ohio was invoked under its general, independent powers of equity. See, *Go-Bart Importing Co. v. United States,* 282 U.S. 344 (1931), and *U.S. v. Rosenwasser,* 145 F. 2d 1015 (9th Cir. 1944).

Fifty Thousand Dollars was seized from petitioner, Anthony P. LaFatch, by agents of the Federal Bureau of Investigation. The $50,000.00, which had been paid to petitioner by respondent, MM Corporation, was subsequently introduced as evidence by respondent, United States of America, during a jury trial of Anthony P. LaFatch involving several counts of extortion under 18 U.S.C. §1951, and alleged violations of the Travel Act, 18 U.S.C. §1952(2). The district court thereby obtained custody of this evidence.

On April 1, 1974, LaFatch was acquitted by the court on one count and by the jury on all other counts against him.

After his acquittal, LaFatch sought by motion to the district court the return of his $50,000.00, which had been placed in the registry of that court. MM Corporation entered an appearance to oppose LaFatch's motion on the ground that it had already sued LaFatch to determine title to the $50,000.00, as well as to seek other damages, in a jury trial in the appropriate state court of competent general jurisdiction, the Common Pleas Court of Franklin County, Ohio. That court then had acquired in personam jurisdiction over both LaFatch and MM Corporation. The district court held LaFatch's motion in abeyance until title was finally determined in the state court.

On March 26, 1976, the state court entered judgment in accordance with a jury verdict against MM Corporation on its claim to the $50,000.00 (still being held by the district court) and against LaFatch for damages in the amount of $15,000.00. App. 29, 30. MM Corporation appealed the judgment, but thereafter voluntarily dismissed its appeal, at which time the judgment was final.

LaFatch then renewed his demand for return of the $50,000.00 by requesting the district court to act on his pending motion. MM Corporation opposed the motion; the United States asserted no claim to the monies. After a hearing, the district court, in a written opinion, held that the state court's judgment against MM Corporation's claim to the $50,000.00 was entitled to full faith and credit and that it was res judicata under Ohio law. Accordingly, it granted LaFatch's motion and ordered the $50,000.00 returned to him. App. 28-36.

MM Corporation appealed this order to the court below, which reversed and remanded for further proceedings without regard to the state final judgment. The Court of Appeals held that the doctrine of res judicata should not be applied since to do so *might* result in a manifest injustice or violate an overriding public policy. App. 20-23.

REASONS AND ARGUMENT FOR GRANTING WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER INTERPRETATION AND APPLICATION OF UNITED STATES CONSTITUTION, ART. 4, §1, AND OF 28 U.S.C. §1738.

The full faith and credit clause[1], as implemented by Congress[2], requires that a federal court give to a final, competent state court judgment full faith and credit and apply the res judicata law of that state to its judgment.

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[1]U.S. Const., art. 4. §1

[2]28 U.S.C. §1738

Durfee v. Duke, 375 U.S. 106 (1963); *Williams v. North Carolina,* 325 U.S. 225 (1945); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1972).

In 1813, this Court in applying these doctrines limited the inquiry to "[W]hat is the effect of a judgment in the state where it was rendered." Mr. Justice Story, *Mills v. Duryee,* 12 U.S. (7 Cranch) 30, 34 (1813).

As Mr. Justice Stewart elaborated in *Durfee v. Duke,* supra at 109:

> The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." Full faith and credit thus generally *requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.* (Footnotes omitted, emphasis added.)

The Ohio state court judgment thus should have been given full faith and credit to operate as res judicata in the court below. In *Norwood v. McDonald,* 142 Ohio St. 299, 52 N.E. 2d 67 (1943), the Ohio Supreme Court explained the concept of res judicata as follows:

> A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to

> the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.

The court then discussed the three primary tests used to determine whether a prior judgment should bar relitigation of a claim between the same parties. These tests require identity of the investitive facts of the claim, of the evidence necessary to support the claim and of the time at which the claim arose. *Id.* at 300. See, *Durfee v. Duke,* supra at 190, note 6.

It is undisputed in this case that the state court had in personam jurisdiction over both LaFatch and MM Corporation. The parties were before that court to litigate title to the $50,000.00 in the registry of the district court at the specific request of MM Corporation. All evidence available was presented by the parties on the issue of title to the monies. The state court decided that MM Corporation had no claim to the $50,000.00. Its claim, by necessity, arose at the same time and out of the same investitive facts as that of LaFatch.

Furthermore, the doctrine of res judicata as espoused by the Ohio Supreme Court in *Norwood v. MacDonald,* supra, was reaffirmed by that court in *Whitehead v. Genl. Tel. Co.,* 20 Ohio St. 2d 108, 254 N.E. 2d 10 (1969) and in *Columbus v. Union Cemetery,* 45 Ohio St. 2d 47, 341 N.E. 2d 298 (1976). In *Columbus v. Union Cemetery, Id.* at 50, 51, the court further reaffirmed the principal that:

> *"A point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined*

> *by a court of competent jurisdiction may not be drawn in question in a subsequent action between the same parties or privities."* (Emphasis in original.)

Accordingly, under Ohio law, the final judgment which held that MM Corporation had no claim to the $50,000.00 was res judicata to any further claim to the monies by MM Corporation against LaFatch. This judgment must be accorded full faith and credit and res judicata in the federal system. *American Surety Co. v. Baldwin,* supra; *Durfee v. Duke,* supra. As Mr. Justice Brandeis, speaking for the Court in *American Surety Co. v. Baldwin,* supra at 166, declared:

> The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question on an independent proceeding in the federal courts.

The court below has ordered the district court on remand to consider again and to decide the question of title without regard to the state court decision. Such decision directly conflicts with this Court's prior rulings, which conflict can only be resolved by granting the writ sought by petitioner.

Since the Ohio court's decision would constitute res judicata under Ohio law, since a prior adjudication has been made, and since the issue at hand could have been pursued in the state judicial system with ultimate review possible by this Court, the state court decision barred MM Corporation's identical claim in the federal system. *American Surety Co. v. Baldwin,* supra at 167.

In *Durfee v. Duke,* supra in 191, this Court made clear that a judgment is res judicata when that court has determined with finality that it has jurisdiction to decide the issues at hand. See also, *Williams v. North Carolina,* 325 U.S. 255 (1945).

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE ADMINISTRATION OF JUSTICE IN THE EXERCISE OF CONCURRENT JURISDICTION BY STATE AND FEDERAL COURTS AND THE FINALITY OF JUDGMENTS.

The full faith and credit clause is a unifying force which renders judicial proceedings in each of the several states binding in each of the sister states and in the federal courts. *Durfee v. Duke,* supra at 116; *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 429, 439 (1944); *American Surety Co. v. Baldwin,* supra at 166. Similarly, the corollary doctrine of res judicata is founded upon public policy encouraging final determinations in legal relationships and upon the importance of judicial economy. *Commissioner v. Sunner,* 333 U.S. 591, 597 (1948).

The court below decided that the final state court judgment between LaFatch and MM Corporation should be ignored and that the district court should once again retry the very same matter in a second trial on the merits. App. 23. This decision directly conflicts with prior important and significant decisions of this Court on the administration of justice. See, *e.g., Durfee v. Duke,* supra.

A federal court has jurisdiction over property in its possession only to the extent that it is necessary for it to dispose of the property. *United States v. Klein,* 303 U.S. 276, 281 (1938). As this Court said in *Klein,* at 281:

> Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective decisions by its control of the property. (citations omitted).

Thus, MM Corporation chose, as permitted by law, to present its claim to the $50,000.00 in state court instead of district court. *Id.; American Surety Co. v. Baldwin,* supra at 165; *U.S. Rosenwasser,* supra at 1017; *Palmer v. Warren,* 108 F. 2d 164, 166 (2nd Cir. 1939), *aff'd* 310 U.S. 132 (1940), App. 19, 26, 29, 30. The district court properly became merely a stakeholder awaiting the decision on title to the monies by the chosen state forum. 14 Wright-Miller-Cooper, *Federal Practice and Procedure,* Jurisdiction, §3631, at 19-21; also cited by Judge Weick, App. 27.

To the contrary, the court below, on the basis of alleged judicial economy, asserted that the district court alone during the criminal proceeding should determine title to any evidence presented. App. 20. This concept conflicts directly with the substantive rights granted claimants by this Court in the cases cited above and ignores the fact that MM Corporation exercised those very rights in the case at bar.

Once MM Corporation chose to litigate its claim in state court it was bound to pursue its claim through the state judicial system. Its only avenue to any federal relief was by appeal or petition to this Court from a ruling by the Ohio Supreme Court. Otherwise the judgment is res

judicata. *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 78 (1940); *Grubb v. Public Utilities Commission,* 281 U.S. 470 (1930); *E. B. Elliott Adv. Co. v. Metropolitan Dade County,* 425 F. 2d 1141, 1148 (5th Cir. 1970); *Norwood v. Parenteau,* 228 F. 2d 148, 150 (8th Cir. 1955).

To the contrary, the court below has provided for collateral attack of the state court judgment by holding that the district court should wholly discard the state court judgment and decide independently after yet another hearing which party owns the $50,000.00. App. 23. As indicated by Judge Weick in his dissent below, the majority decision in effect holds that the state court judgment is res judicata against LaFatch, but is not res judicata against MM Corporation. App. 26.

Apparently, the court below believed that the district court, since it has the money, should apply the same burden of proof as was applied by the state court and substitute its judgment for that of the state court and jury on the same facts presented in the state proceeding. This process, according to the court below, is in the interest of judicial economy and does not undermine the doctrine of res judicata. Such a conclusion defies reality.

This Court has granted writs of certiorari to remedy just such ills in the administration of justice. *E.g., Durfee v. Duke,* supra. The decision below nullifies the express mandate of Congress and years of progress by this Court in establishing the proper relationships between state and federal courts exercising concurrent jurisdiction. *Id.; United States v. Klein,* supra; *American Surety Co. v. Baldwin,* supra; 28 U.S.C. §1738. As stated by Mr. Justice in *Treinies v. Sunshine Mining Co.,* supra, at 78:

One trial of an issue is enough.

In addition, the court below has unilaterally imposed on the district court a rare exception to the application of res judicata. This exception prevents the doctrine from operation when it would result in manifest injustice to a party or violate an overriding public policy. App. 20-21.

This exception, articulated in the cases cited by the Court of Appeals, is founded on cases where new or different substantive rights are involved as expressed in public policy legislation. None of these cases remotely resemble either factually or procedurally the issues in the case at bar[1].

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[1]The following cases are cited (App. 20-21) by the lower court in support of the exception to res judicata it applied below.

Tipler v. E. I. dePont deNemours and Co., 433 F. 2d 125 (6th Cir. 1971), was a case under Title VII of the Civil Rights Action of 1974 (42 U.S.C. §2000e) in which the court held that previous litigation under the National Labor Relations Act (29 U.S.C. §158) was not res judicata in the present case.

Bronson v. Board of Education of the City School District of Cincinnati, 525 F. 2d 344 (6th Cir. 1975) was a class action concerning alleged racial discrimination on the part of the school board. The court found that since *some* of the continuing plaintiffs were not parties to previous litigation concerning racial discrimination in the same district, res judicata did not bar the present suit as to those plaintiffs. *Id.* at 349, 351.

Cooper v. Philip Morris, Inc., 464 F. 2d 9 (6th Cir. 1969) was an employment discrimination class action under Title VII, Civil Rights Action of 1974 (42 U.S.C. §2000e), in which the court held that a determination on alleged discrimination by the Kentucky Commission on Human Rights, an administrative agency, was not res judicata because the federal remedy under the civil rights action was independent and cumulative, *Id.* at 10.

Creating exceptions to the application of full faith and credit and res judicata is of such importance and significance to this Court that it has reserved to itself the exclusive right to determine any exceptions. In *Magnolia Petroleum Co. v. Hunt*, supra at 438, the Court held:

> Even though we assume for present purposes that the command of the Constitution [Art. 4, §1] and the statute [28 U.S.C. §1738] is not all embracing, and that there may be exceptional cases in which the judgment of one state may not override two laws and policy of another, *this Court is the final arbiter of the extent of the exceptions.* (Original citations and footnotes omitted, emphasis and citations added.)

This Court has not ruled on the existence or extent, if any, of the exception fashioned by the court below. Since there is no paramount judicial policy or policy of Congress involved in this matter, the public policy exception is inapplicable. See 1 B J. Moore, *Federal Practice*, ¶0.409[11] (1974). Accordingly, this must be a new exception on which this Court should rule.

This new exception became operative on the lower court's speculation as to what are the facts concerning ownership of the $50,000.00. It formulated its speculation from portions of the criminal transcript, ignoring that the criminal transcript was improperly included in the record of a determination in equity, and discarded the state court decision on the merits. App. 21, 23. That court then found an exception to the applicability of res judicata because, depending upon the facts as later to be determined by the

district court, a manifest injustice may occur or an overriding, self-styled public policy may be violated. App. 21-23. Full faith and credit is not mentioned. App. 16-23.

One of the axiomatic purposes of full faith and credit and res judicata is to prevent other courts from tampering with final decisions of competent tribunals. *Magnolia Petroleum Co. v. Hunt,* supra; *Mills v. Duyree,* supra. The decision of the court below directly conflicts with these longstanding constitutional, legislative and judicial policies.

Furthermore, it is the public policy of Ohio to prohibit multiplicity in suits and vexatious litigation. *Covington & Cincinnati Bridge Co. v. Sargent,* 27 Ohio St. 233 (1875); *LaBarbera v. Batsch,* 10 Ohio St. 2d 106, 227 N.E. 2d 55 (1967), 32 Ohio Jurisprudence 2d, *Judgments,* §195, pp. 397-401 (1975). The doctrine of res judicata is a cornerstone of Ohio public policy and jurisprudence, which was entitled to full faith and credit below.

The court below has rendered an opinion, (a) which directly conflicts with this Court's long established principles on the exercise of concurrent jurisdiction by state and federal courts in the determination of disposition of property held by a federal court, (b) which directly conflicts with this Court's compelling interest in fostering judicial economy, and (c) which directly conflicts with this Court's announced role as the sole arbiter of any exception to the stringent application of the doctrines of full faith and credit and res judicata by district courts to final state court judgments.

Given the blatant disregard by the lower court of these fundamental legal precepts, this is a compelling case for granting petitioner's writ of certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Sixth Circuit.

Respectfully submitted,

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February 16, 1978

APPENDIX

No. 76-2270

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTHONY P. LaFATCH,
Defendant-Appellee,

and

MM CORPORATION,
Petitioner-Appellant.

Appeal from the United States District Court for the Southern District of Ohio

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Decided and Filed September 2, 1977.

Before PHILLIPS, Chief Judge, CELEBREZZE, Circuit Judge, and GUY, District Judge.*

PHILLIPS, Chief Judge. This appeal involves conflicting claims of ownership of $50,000 admitted into evidence in a criminal proceeding. Anthony P. LaFatch was indicted for having obtained the $50,000 from a subsidiary of MM Corporation, the appellant, by extortion in violation of 18 U.S.C. §1951, and on five other counts. Appellant states that the Justice Department was informed of the initial approaches made by LaFatch and that appellant paid the $50,000 to LaFatch under FBI surveillance.

*Honorable Ralph B. Guy, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

At the close of the Government's proof, the district court dismissed the extortion charge in the first count of the indictment, holding that the evidence was insufficient to sustain a conviction on that count. The jury returned a verdict of not guilty on the remaining five counts.

After the trial, LaFatch filed a motion in the district court asking for the return of the $50,000 seized from him. Appellant opposed this motion and subsequently filed a suit against LaFatch in the Court of Common Pleas of Franklin County, Ohio, seeking to recover the $50,000. The jury in the State court returned a verdict of $15,000 against LaFatch in favor of appellant. Appellant states that this $15,000 corresponds to interest on the $50,000. The Common Pleas Judge refused to order the return of the $50,000 to appellant, on the ground that the jury verdict precluded further consideration by that court of any additional award to appellant. Appellant filed an appeal to the Ohio Court of Appeals from the judgment of the Common Pleas Court, but thereafter dismissed the appeal on its own motion, for reasons not disclosed.

The money remained in the custody of the district court throughout the criminal trial and the subsequent civil action in the State Court of Common Pleas. Thereafter, the district court concluded that the judgment of the State court was res judicata as to the ownership of the money and granted the motion of LaFatch that the $50,000 be released to him. MM appealed. The district court ordered that the $50,000 remain in its custody pending final disposition of this appeal.

For the reasons hereinafter stated, we hold that the doctrine of res judicata should not be applied in the present case. We reverse the decision of the district court and remand for further proceedings consistent with this opinion.

Evidence was introduced in the criminal trial of LaFatch regarding the alleged extortion attempt. A subsidiary of MM desired to sell securities of Realty National, an Ohio corporation, to be public. Requisite filings were submitted to the Ohio Division. After the registration had been pending for eight months, there is evidence to the effect that LaFatch informed the president of Realty National that he could arrange immediate approval if he were paid $50,000. The president of Realty National and his attorney conferred with officials of the Department of Justice and disclosed the proposition made by LaFatch. The FBI then was contacted. It was agreed that Realty National would pay LaFatch $50,000 under FBI surveillance. MM supplied the $50,000, with its president and the president of Realty National personally guaranteeing the return of the money to the corporation.

The money was "laundered" in Las Vegas so as to render it difficult to trace, but the FBI made photostatic copies of all the bills. LaFatch was paid $50,000 in two equal installments, the first half in advance and the other half after approval of the registration by Ohio authorities. Shortly after the last payment, the FBI stopped LaFatch's automobile and recovered the $25,000 in currency. Most of the remaining $25,000 was seized by the FBI in the LaFatch home in Miami, Florida, along with a fully loaded revolver and extra rounds of ammunition.[1] The $50,000

[1]The record in the criminal trial does not indicate that any part of the $50,000 paid to LaFatch was shared by any officer or employee of the Ohio Department of Commerce, the Division of Securities, or

(continued)

was introduced in evidence in the trial of LaFatch and has remained continuously in the custody of the district court since that time.

The issue presented on this appeal is whether the district court was correct in holding that LaFatch is entitled to have the money returned to him on the ground that the decision of the State court is res judicata.

The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated. *See, McSurley v. Ratliff,* 398 F.2d 817 (6th Cir. 1968). Conflicting claims of ownership between the defendant from whom the property was seized and another claimant create a dilemma for a district court. As Judge Learned Hand said:

> A court, which has custody of the res, must at some time surrender it, and it can know to whom it should deliver only in case it either decides the right to possession itself, or awaits the action of such other competent tribunal as the claimant may choose, *Palmer v. Warren,* 108 F.2d 164, 166 (2d Cir. 1939), *aff'd,* 310 U.S. 132 (1940).

[1](continued)

other State official. LaFatch claimed that the $50,000 was a "finders fee" offered and paid to him by MM. The State Director of Commerce and other State officials testified that the Realty National registration was approved following conferences with the attorneys representing the applicant, and only after the applicant had made certain modifications required by the Division of Securities.

The interests of judicial efficiency dictate that the problem should be resolved by the criminal trial court. In *United States v. Wilson,* 540 F.2d 1100, 1104 (D.C. Cir. 1976), the court said:

> Property which is seized in a criminal proceeding either by search warrant or subpoena may be ultimately disposed of by the court in that proceeding or in a subsequent civil action. It makes for an economy of judicial effort to have the matter disposed of in the criminal proceeding by the judge that tried the case.

The district court concluded that the judgment of the Ohio Court of Common Pleas is res judicata of the issue of ownership of the $50,000.00. Res judicata is a judicially created doctrine under which a valid final judgment is binding on the parties as to all matters of law that were or should have been adjudicated in a proceeding. The doctrines of res judicata and collateral estoppel have the salutary effect of bringing litigation to a final resolution and preventing repetitive suits over the same matter.

The doctrine of res judicata should not be applied, however, when it would result in manifest injustice to a party or violate an overriding public policy. In *Tipler v. E. I. dePont deNemours and Co.,* 443 F.2d 125, 128 (6th Cir. 1971), this court, speaking through Judge William E. Miller said:

> Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice. Title v. Immigration

> and Naturalization Service, 322 F.2d 21 (9th Cir. 1953); Matias Rivera v. Gardner, 286 F. Supp. 305 (D.P.R. 1968); Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local Union No. 584, 281 F. Supp. 971 (E.D.N.Y. 1968); 1B Moore's Federal Practice ¶0.405[12], at 791; 2 K. Davis, Administrative Law Treatise §18.02 at 548 (1958).

To like effect see *Bronson v. Board of Education,* 525 F.2d 344, 349 (6th Cir. 1975); *Cooper v. Philip Morris, Inc.,* 464 F.2d 9, 10 (6th Cir. 1972).

Professor Moore states the rule as follows:

> Although, on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding public policy or resulted in manifest injustice to a party. (Footnotes omitted.) 1B J. Moore, Federal Practice, ¶0.405[11] (1974).

Nothing in this opinion is intended to indicate any view on the part of this court as to the merits of the respective claims of LaFatch and MM to the $50,000. Neither do we make any factual determination. Our recitaion of facts is nothing more than a summary of certain evidence introduced in the criminal trial of LaFatch.

If the facts concerning the payment of $50,000 by appellant to LaFatch are as set forth above, the application

of res judicata in the present case results in a manifest injustice. Res judicata would permit LaFatch to keep $50,000 which he received as a payoff. Appellant would lose $50,000 which it paid to LaFatch in collaboration with the FBI. Furthermore, application of res judicata in the present case would violate overriding public policy. Solicitation of bribes or payoffs in public matters is manifestly contrary to the public interest. In these times of increasing white collar crime, private citizens should be encouraged to cooperate with law enforcement officers in thwarting attempts at bribery and extortion. In the present case, it is asserted that private individuals reported to the Department of Justice what they believed to be an unlawful attempt by LaFatch to obtain money from them in return for approval of their stock registration. They claim that the money was paid on behalf of appellant to LaFatch in cooperation with the FBI. If these allegations are true, public policy should prevent appellant from losing its money because of the doctrine of res judicata. A contrary result, to use the language of Professor Moore, would create a situation where "res judicata renders white black, the crooked straight." As Professor Moore said in his treatise, 1B J. Moore, Federal Practice, ¶0.405[12] (1974):

> In what is here said there is no desire to undermine res judicata. Res judicata is a sound and salutary principle that deserves to be respected and applied. But at times there is considerable truth in the observation that res judicata renders white black, the crooked straight. And an application of a principle, albeit the principle is sound, that produces such results may be questioned. Rigidity in applying legal principles, certainly most and

> probably all such principles, is undersirable. A little flexibiity in application can make a common sense accommodation of a sound principle to the particular facts without sacrifice of the principle and with greater justice to all concerned. (Footnotes omitted.)

It is to be emphasized that the res, the $50,000, has remained in the custody of the district court continuously since the time it was introduced into evidence. It now is the obligation of the district court to return this money to the rightful owner. We hold that this should be done in the present case without regard to the decision of the State court.

The acquittal of LaFatch in the criminal proceedings does not necessarily mean that he is the rightful owner of the money. In the criminal proceedings the jury determined that the evidence was not sufficient to establish the guilt of LaFatch beyond a reasonable doubt. The right to ownership of the money, on the other hand, need be established only by the preponderance of the evidence.

Accordingly, the decision of the district court is reversed and the case is remanded. The district court is directed to make a determination, supported by findings of fact, as to which claimant is the rightful owner of the $50,000. No costs are taxed. Each party will bear its own costs on the appeal.

No. 76-2270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTHONY P. LaFATCH,
Defendant-Appellee,

and

MM CORPORATION,
Petitioner-Appellant.

ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, Chief Judge, CELEBREZZE, Circuit Judge, and GUY, District Judge.*

A majority of the judges of the court having voted against rehearing en banc, the petition for rehearing has been assigned to the hearing panel.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman
CLERK

*Honorable Ralph B. Guy, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

No. 76-2270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, :
Plaintiff :

vs :

ANTHONY P. LaFATCH, : DISSENTING
Defendant-Appellee, : OPINION

and :

MM CORPORATION, :
Petitioner-Appellant. :

WEICK, Circuit Judge, dissenting. This appeal, involving important questions of the Full Faith and Credit Clause of the Constitution, res ajudicata, and conflicts between federal and state courts of concurrent jurisdiction where the state court action was based on in personam jurisdiction and had proceeded to final judgment with the permission of the federal court, certainly merited en banc consideration by this Court and affirmance of the judgment of the District Court.

LaFatch had been acquitted by a directed verdict of acquittal in the District Court on a charge of extortion, and had been acquitted by a jury on a charge of violating the Travel Act. After his acquittal LaFatch filed a motion in the District Court seeking the return to him of $50,000,

which sum had been paid to him for services by MM Corporation. This money had been seized from him by the F.B.I. and was deposited in the registry of the Court.

MM Corporation, by papers filed in the District Court, opposed LaFatch's motion on the ground that it had filed suit against LaFatch to recover such moneys and punitive damages in the Common Pleas Court of Franklin County, Ohio, where it could obtain a jury trail. The Common Pleas Court is a court of general jurisdiction, whereas the District Court has limited jurisdiction.

The District Court permitted the parties to proceed with the trial of said action in the state court, which court, as before stated, had acquired in personam jurisdiction over both parties. The jury returned a verdict against LaFatch in the amount of $15,000, and judgment was entered thereon. MM Corporation appealed therefrom to the Court of Appeals of Franklin County, Ohio, on the ground of inadequacy of the verdict and judgment. Later MM Corporation voluntarily dismissed its appeal, and the judgment of the state court against LaFatch became final. I submit that the state court judgment became final against MM Corporation as well as against LaFatch.

MM Corporation then filed its motion in the District Court seeking the return to it of the $50,000, although it had previously opposed federal jurisdiction in favor of the suit which it had filed in the state court. The District Judge properly held that the judgment of the state court was res ajudicata and ordered the money in the registry turned over to LaFatch.

The Constitutional issue concerning the Full Faith and Credit Clause has been adequately briefed by counsel for LaFatch. I desire only to refer to 14 Federal Practice and

Procedure, Wright-Miller-Cooper §3631 pages 19-21, where the authors state, with citation of authority:

> It is not considered an interference with one court's exclusive control of a res for another court to adjudicate the right of an individual to that res in an in personam action. An action to establish a right to share in property in the custody of another court may be brought whether the res is in the custody of a state or federal court, and the decision is binding on the court that has possession of the property, so long as a decision has not yet been rendered in that court.

MM Corporation has been playing "fast and loose" with the federal and state courts. We ought not to approve this type of conduct. If the decision of the panel is upheld, it could result in MM Corporation's recovery of the $50,000 from the registry of the Court by judgment of the District Court, and an additional $15,000 by judgment in its favor in the state court. In other words, the state court judgment is res ajudicata against LaFatch, but not against MM Corporation.

MM Corporation's argument that the $15,000 judgment represents interests is frivolous. The record in the state court establishes the untruthfulness of that contention. Furthermore, money deposited in the District Court's registry does not draw interest.

One other matter deserves mention. The establishment of State-Federal Judicial Councils was for a useful and laudable purpose. That purpose will be frustrated by federal decisions overturning final judgments of state courts.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY P. LaFATCH,
Defendant.

Criminal
No. 9906

OPINION AND ORDER

This matter is before the Court on defendant Anthony P. LaFatch's motion for release of seized evidence. A memorandum in opposition to the motion was filed on behalf of MM Corporation, John W. Vogel and Michael McKenzie, in which MM Corporation [the corporation] makes a claim to the property. A hearing on the matter was held on June 10, 1976.

A review of the facts surrounding the seizure of and the claims made to the property is necessary to the issue presently before this Court. In 1973, the corporation paid $50,000.00 in currency to Anthony LaFatch as part of a transaction arising from an application for the registration of a public issue of securities by the corporation. Although the corporation supplied the original $50,000.00, Vogel and McKenzie guaranteed the return of the money to the corporation. Prior to the transfer of the funds to LaFatch, Vogel and McKenzie had been in contact with the United States Department of Justice and were advised that the Justice Department would monitor the entire transaction.

Shortly after the transfer of the money, agents of the Federal Bureau of Investigation seized from the possession of LaFatch, and pursuant to a search warrant, currency, one bank money order and one cashier's check totalling $50,000.00 to be used in evidence in criminal proceedings against LaFatch. Upon the seizure, LaFatch received a receipt for the money from the agents.

On September 27, 1973, a six count indictment was returned, charging LaFatch with extortion and use of facilities of interstate commerce to carry on unlawful activities. On April 1, 1974, after a full trial at which Vogel and McKenzie testified against LaFatch, a jury acquitted defendant LaFatch of all criminal charges brought against him.

On April 3, 1974 LaFatch moved for return of the $50,000.00 to him, and on April 19, 1974, a memorandum contra the motion was filed with this Court on behalf of the corporation, Vogel and McKenzie. In that memorandum, these persons stated that a civil action brought by them in the Common Pleas Court of Franklin County, Ohio against Anthony P. LaFatch had been filed, "seeking among other things, to recover the $50,000.00 . . . ."

The civil action brought in state court by the corporation, Vogel and McKenzie was based upon various legal and equitable claims. The plaintiffs in that action prayed that "any claim that [LaFatch] may have or make to the $50,000.00 paid to him be held in constructive trust for plaintiff MM Corporation," and asked for compensatory damages, punitive damages, and attorneys fees as well.

On November 24, 1975 and after a full trial on the merits, civil jury returned a verdict for $15,000.00 in favor

of the corporation and against LaFatch.[1] The jury had been charged on the issue of fraud, and the trial court reserved to itself the determination of the equitable issues in the case. Subsequent to the return of the jury's verdict, counsel for the corporation invoked the equitable jurisdiction of the trial court for further relief. The common please court judge on March 12, 1976 rendered an opinion adverse to the corporation, holding "that the jury verdict of November 24, 1975 precluded further consideration by the Court of any additional award to Plaintiff . . . ."

Plaintiffs in the civil action appealed the judgment of the trial court, but on May 4, 1976 that appeal was dismissed upon the motion of the plaintiffs-appellants.

The corporation now asks this Court to "impose a constructive trust on the $50,000.00 which is now *in custodia legis* for the benefit of [the corporation], and return the money to it." The Court asked counsel for LaFatch and the corporation to submit briefs on the question of the effect of the state court proceedings upon the corporation's claim to the funds.

Title 28, United States Code, Section 1738 provides that the judicial proceedings of any court of any state

> shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the court of such State . . . from which they are taken.

[1]The plaintiffs apparently assumed that the jury's award related to interest in the amount of $15,000.00 paid by the corporation on the $50,000.00 borrowed by it and transferred to LaFatch. The jury also returned verdicts in favor of Vogel and McKenzie on LaFatch's counterclaim.

In the matter presently before this Court, this legislative mandate requires that this Court accord to the judgment rendered by the Court of Common Pleas of Franklin County, Ohio the same *res judicata* effect that would be accorded to it by the courts of Ohio. *See American Surety Co. v. Baldwin,* 287 U.S. 156, 166-167 (1932); *Hazen Research, Inc. v. Omega Minerals, Inc.,* 497 F.2d 151, 153 (5th Cir. 1974).

The Ohio Supreme Court, in the seminal decision of *Norwood v. McDonald,* 142 Ohio St. 299 (1943), articulated Ohio's concept of the doctrine of *res judicata:*

> A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.

Id. at 299. That court further established guidelines by which it may be determined whether or not a prior judgment rendered by an Ohio Court constitutes a bar to a subsequent action between the same parties:

> . . . the primary tests are the identity of investitive facts creating the right of action in each case; the identity of the evidence necessary to sustain each action; and the accrual of the alleged rights of action at the same time.

Id. at 300.

Just as it is undisputed that the state court in which the civil action was filed is a court of competent jurisdiction to determine the issues presented to it, it is likewise undisputed that the judgment rendered by that court is final.[2] The corporation now contends that the final state court decision is not *res judicata* to its request that this Court impose a constructive trust upon the fund, arguing that that issue was not, and could not have been, adjudicated by the state court.

When viewed against the Ohio Supreme Court's guidelines for determining the effect of a judgment rendered by an Ohio court, the corporation's claim in this Court is clearly barred by the final judgment rendered by the Court of Common Pleas. The operative facts underlying its claim before this Court are precisely the same as those underlying its claims before the state court. Further, were this Court to entertain the corporation's claim, the same evidence presented to the state court would necessarily be presented to this Court. Finally, because the same facts giving rise to the corporation's claims before the state court give rise to its "claim" before this Court, it is clear that both "rights of action" accrued at the same time.

In short, although the corporation now requests that this Court place a constructive trust upon the funds themselves, whereas the request made of the state court was that a constructive trust be placed upon "any claim

[2]In explanation of plaintiffs-appellants' voluntary dismissal of their appeal from the judgment of the trial court, counsel for the corporation stated at the hearing held in this matter that the decision to dismiss the appeal was based upon confidential information relayed to counsel by plaintiff Vogel. The other plaintiffs concurred in the decision to dismiss the appeal.

that [LaFatch] may have to make" to the funds, this Court does not consider a mere refinement in semantics to be a determinative factor in the application of the doctrine of *res judicata.* Fundamentally, the corporation's efforts in both the state court and this Court may be viewed as duplicate attempts to establish a right to the $50,000.00 in the corporation that is superior to any rights that LaFatch may have to the money. The application of the doctrine of *res judicata* is not suspended, however, by a mere change in the theory of a previously litigated cause of action. *Golden v. Mascari,* 63 Ohio App. 139 (1939).

The corporation further argues that the jury's verdict in its favor on the issue of fraud requires as a matter of law the imposition of a constructive trust upon the $50,000.00. Even if this Court were to agree with that statement of law, however, this contention must fail, for mere error in an otherwise valid, final judgment does not constitute an exception to the doctrine of *res judicata.*

> The reason for this rule is that the doctrine of *res judicata* would be abrogated if every decision could be relitigated on the ground that it is erroneous, and there would be no stability of decision, or no end to litigation.

LaBarbera v. Batsch, 10 Ohio St.2d 106, 110 (1967).

If it is true, as the corporation contends, that the common pleas court judge committed error in refusing to impose a constructive trust upon either the fund itself or upon LaFatch's claim to the fund, the corporation's remedy lay in appeal of that decision. The corporation voluntarily chose not to pursue that remedy, and the doctrine of *res judicata* now binds it to that decision.

WHEREUPON, the Court determines that defendant LaFatch's motion for release of seized evidence is meritorious and it is hereby GRANTED.

Upon the expiration of the time for filing notice of appeal in this matter or upon the receipt of the final mandate from the Court of Appeals in favor of defendant LaFatch, the Court will order the Clerk of this Court to release the funds seized for use in evidence in this action to the defendant Anthony P. LaFatch through his counsel.

/s/ Joseph P. Kinneary

JOSEPH P. KINNEARY
United States District Judge

United States District Court

FOR THE

SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action File No. CR. 9906

UNITED STATES OF AMERICA,

vs.

ANTHONY P. LaFATCH,

JUDGMENT

This action came on for consideration before the Court, Honorable Joseph P. Kinneary, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is Ordered and Adjudged that defendant LaFatch's motion for release of seized evidence is meritorious and it is hereby GRANTED.

Upon the expiration of the time for filing notice of appeal in this matter or upon the receipt of the final mandate from the Court of Appeals in favor of defendant LaFatch, the court will order the Clerk of this Court to release the funds seized for use in evidence in this action to the defendant Anthony P. LaFatch through his counsel.

Dated at Columbus, Ohio this 16th day of August, 1976.

Approved for entry /s/ Joseph P. Kinneary
JOSEPH P. KINNEARY
United States District Judge

/s/ John D. Lyter
JOHN D. LYTER
Clerk of Court

BY: /s/ name illegible
Deputy Clerk

In the

Supreme Court of the United States

January Term, 1978

No. 77-1180

ANTHONY P. LaFATCH,
Petitioner,

v.

MM CORPORATION,
Respondent,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MISCELLANEOUS

QUESTION PRESENTED

When a state court of competent jurisdiction has rendered a final judgment on the merits of one claim between two persons but has not rendered a final judgment on a second claim between such persons, with respect to which the state court did not have competent jurisdiction, is the res judicata doctrine a bar to a subsequent action in a district court of competent jurisdiction with respect to the second claim?

STATEMENT OF THE CASE

After the acquittal referred to in Petitioner's Statement of the Case, MM Corporation entered an appearance opposing Petitioner's motion for return of the $50,000 on the ground that an action for damages for fraud and to impose a constructive trust upon Petitioner was pending in the Court of Common Pleas of Franklin County, Ohio. The district court held the LaFatch motion in abeyance.

Prior to the conclusion of the state case, the judge withdrew from the consideration of the jury that equitable aspect of Respondent's complaint which sought imposition of a trust. Thereafter, the jury found "the issues in the case on the Complaint in favor of the Plaintiff, MM Corporation and assess the amount of the recovery due to the Plaintiff, MM Corporation from the Defendant at the sum of $15,000" Res. App. 15. The jury verdict did not make any finding "against MM Corporation on its claim to the $50,000 (still being held by the district court)" as the Petitioner states. Even though he had expressly withdrawn from the jury the prayer for imposition of a constructive trust on the Petitioner, the trial judge refused to consider that issue separately, on the ground that he was bound by the jury verdict, *i.e.*, he could not award any relief in addition to

that awarded by the jury.

MM Corporation then asked the District Court to return the money to it.

REASONS AND ARGUMENT FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY DECLINED TO APPLY THE DOCTRINE OF RES JUDICATA TO THE DECISION OF THE STATE COURT DUE TO THE STATE COURT'S LACK OF JURISDICTION OVER THE RES AND ITS DECISION NOT TO ATTEMPT TO ASSERT THAT JURISDICTION.

In the decision below the Court of Appeals found that the Federal District Court, in possession of a Fifty Thousand Dollar ($50,000.00) fund seized as evidence in a criminal prosecution, was not bound by the res judicata effect of a state court decision. The Court of Appeal's decision was based upon a recognition of the nature of the state court decision, the lack of jurisdiction of the state court over the res as well as the policy considerations involved (discussed in argument II).

The decision below was grounded in a recognition of the fact that the federal district court which controlled the fund was solely vested with the authority to determine its distribution:

> "It is to be emphasized that the res, the $50,000, has remained in the custody of the district court continuously since the time it was introduced into evidence. It is now the obligation of the district court to return this money to its rightful owner. We hold this should be done in the present case, without regard to the decision of

> the State court." (Pet. App. p. 23.)

The state judgment, while determinative on the question of fraud, had no effect on the res which was not subject to its jurisdiction.

The doctrine of res judicata, as its name would indicate, is applied when there is a judgment of issues. The state court refused to exercise its jurisdiction on the equitable issues; as a result, there can be no preclusion of the District Court jurisdiction to decide these issues in its determination of the recipient of the fund in its custody.

Jurisdiction over the disposition of evidence in the custody of the District Court rests solely with the District Court. Jurisdiction over that evidence had been acquired by that Court as a result of the criminal action prior to any action brought in the state court. As a result, extension of jurisdiction by the state court over the same subject matter was precluded, and for this reason was not sought in the state action.

Had the District Court not had and retained jurisdiction over the money as a result of its in personam jurisdiction over LaFatch, proceedings could not properly have been before that Court for the disposition of the money. Although the amount in controversy was in excess of Ten Thousand Dollars ($10,000.00), the parties were not of diverse citizenship in this proceeding of a civil genre and no substantial federal question was before the District Court.

The dispute over disposition of the money is an action in rem. The issue is concerned solely with title to the property. The parties are agreed that the District Court

had jurisdiction over the money at the conclusion of the criminal proceedings. No court was competent to wrest this jurisdiction from the District Court, and the state court was not asked to do so.

Controlling case law dictates that the District Court alone acquired and retained jurisdiction over the specific Fifty Thousand Dollars ($50,000.00) and its disposition. In *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), the Supreme Court treated this question. *Kline* involved a suit for breach of contract; an action had been brought in federal district court first and thereafter an action was filed in state court. After a complicated course of counterclaims, removal to the federal court and back again to the state court, a mistrial in the state court, and proceedings to enjoin the state action, the case came before the Supreme Court on the question of whether the district court could enjoin proceedings on the same issues in the state court in an in personam action until disposition of the matter was had in federal court. The *Kline* decision is quoted below:

> "[State courts and those of the United States] do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and *when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.* The regulation of process, and the decision of questions relating to it, are part of the

> jurisdiction of the court from which it issues.
>
> * * *
>
> "It is settled that when a state court and a court of the United States may each take jurisdiction of a matter, *the tribunal whose jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted...."*
>
> * * *
>
> "The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. [Citations omitted.] *The rule is limited to actions which deal either actually or potentially with specific property or objects. Where a suit is strictly in personam,* in which nothing more than a personal judgment is sought, *there is no objection to a subsequent action in another jurisdiction,* either before or after judgment, although the same issues are to be tried and determined; and this *because it neither ousts the jurisdiction of the court in which the first suit was brought,* nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law." *Kline, supra,* 260 U.S. 226, 230-232; [Emphasis added].

The *Kline* case also stated that where a federal court has acquired jurisdiction of the subject matter of a cause, it may enjoin an action in state court where the effect of the state court action would be to defeat or impair federal jurisdiction.

As this Court noted in the case of *Fall v. Eastin*, 215 U.S. 1 (1909):

> "...[H]owever plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the res, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree is firmly established." 215 U.S. at 11.

The Court continued in stating that as between two state courts, only a decision acting upon a person, as opposed to a particular piece of property, is entitled to full faith and credit in a court of another jurisdiction:

> "...[W]here...the subject matter is specific property and the relief when granted is such that it *must* act directly upon the subject matter, and not upon the person of the defendant, the jurisdiction must be exercised by the State in which the subject matter is situated." 215 U.S. at 12.

The identical result occurs as between a state court and a federal court having exclusive control over the res.

> "[T]he principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." *Penn General Casualty Co. v. Commonwealth of Pennsylvania*, 294 U.S. 189, 195 (1934).

> "The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating

> thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power." *Farmers Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U.S. 51, 61 (1900).

The state court civil action for fraud did not confer or seek to confer jurisdiction over the res on the state court. Plaintiffs in that action could not and did not seek any remedy as to the Fifty Thousand Dollars ($50,000.00) in the custody of the District Court. *Kline* dictates that the District Court disregard any ruling of the state court with respect to the res because the state court had no jurisdiction over the res.

The state court lacked jurisdiction for two reasons: 1) the res was in the exclusive jurisdiction of the federal District Court and, therefore, the state court was precluded from attaching jurisdiction, and 2) the state court was not asked to make disposition of the res in the federal court—that question was not before it. With the realization that the state court had in personam jurisdiction over LaFatch but lacked jurisdiction over the Fifty Thousand Dollars ($50,000.00) in the custody of the District Court, Plaintiffs prayed the state court to have any claim that LaFatch might have or make to the Fifty Thousand Dollars ($50,000.00) held in constructive trust for Plaintiff MM. Had judgment been awarded in favor of Plaintiff MM on that prayer, the judgment would not have empowered MM to attach the Fifty Thousand Dollars ($50,000.00) in the District Court.

II. EVEN HAD THE STATE COURT ASSERTED JURISDICTION OVER THE RES, EITHER BY CHOICE OR BY LAW, PUBLIC POLICY CONSIDERATIONS MANDATED THAT THE DOCTRINE OF RES JUDICATA NOT BE APPLIED BY THE FEDERAL COURT.

Petitioner argues that the Court of Appeals has created a "rare exception" to the application of the res judicata doctrine and has further invaded the province of the Supreme Court with respect to the claimed new exception. By making such grave assertions, petitioner encourages this Court to review mere policy matters considered by the court below and directs attention away from the substantial justice accomplished there. Moreover, neither assertion is accurate. Petitioner cites *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1949) for the proposition that the Supreme Court has "reserved to itself the exclusive right to determine any exceptions" to the application of the res judicata doctrine. *Magnolia* is one of a line of cases involving inconsistent adjudications in sister states, *see, also, Milwaukee County v. White Co.,* 296 U.S. 268 (1935) and *Williams v. North Carolina,* 317 U.S. 287 (1942). Thus, the result in *Magnolia* directly turned on principles of full faith and credit and comity, not on principles of res judicata. The court below was not confronted with a "local policy meriting recognition as a permissible limitation upon the full faith and credit clause," *Milwaukee County,* 296 U.S. at 274, and it therefore did not invade any area properly reserved by the Supreme Court.

Secondly, the court below did not "create an exception" to the res judicata doctrine. The Supreme Court held in the case of *Mercoid Corporation v. Mid-Continent Investment Company,* 320 U.S. 661 (1944) that the res judicata doctrine ought not be applied where the effect of its application would be inconsistent with

public policy, *Id.* at 670 (res judicata offered as bar to patent infringement claim). Res judicata is a judicially-created concept which is grounded upon public policy considerations. *Partmar Corp. v. Paramount Theatres, Inc.,* 347 U.S. 89 (1953).

There have been a number of cases in lower federal courts which incorporate this balancing of the policies underlying res judicata with other public policies, *see,* e.g., *Moch v. East Baton Rouge School Board,* 548 F.2d 594 (5th Cir. 1977) *cert den'd.* 46 U.S.L.W. 3218 (10-3-77); *Smith v. Pittsburgh Gage and Supply Co.,* 464 F.2d 870 (3d Cir. 1972). The court below had utilized this equitable balancing approach on at least three other occasions. (Pet. app. 20-21.)

A fundamental aspect of the policy underlying res judicata is the interest in "avoiding repetitious litigation". *Partmar Corp.,* 347 U.S. at 91. The goal of "economy of judicial time" is a paramount value underlying res judicata. *Commissioner of I.R.S. v. Sunnen,* 333 U.S. 591 (1947). The Court of Appeals below recognized the effect of this policy goal upon the instant case:

> "The interests of judicial efficiency dictate that the problem be resolved by the criminal trial court. [citation omitted]
>
> '...It makes for an economy of judicial effort to have the matter disposed of in the criminal proceeding by the judge that tried the case.' " (Pet. App. p. 20.)

The fundamental policy of judicial economy underlying the doctrine of res judicata runs in favor of prohibiting the control by the state court over the fund. The pertinence of this overriding policy to the facts at hand requires the result reached by the Court of Appeals below.

The Court of Appeals further pointed to other policy considerations involved in its decision not to award the Fifty Thousand Dollar ($50,000.00) fund to the defendant in the original criminal case.

> "Furthermore, application of res judicata in the present case would violate overriding public policy. Solicitation of bribes or payoffs in public matters is manifestly contrary to the public interest. In these times of increasing white collar crime, private citizens should be encouraged to co-operate with law enforcement officers in thwarting attempts at bribery and extortion." (Pet. App. p. 22.)

Public policy cannot tolerate any other outcome. The burden on a private person of reporting apparent criminal activity to law enforcement agencies is substantial enough without this risk. It is unconscionable to place such a financial burden on a private person for cooperation with law enforcement efforts against white collar crime. Thus, the result below is not a "rare exception" to the res judicata doctrine, but is consistent with its fundamental equitable principle.

Equity dictates that the District Court return the Fifty Thousand Dollars ($50,000.00) to the person who supplied and paid it. MM, a private person, reported LaFatch's solicitation of this money to the FBI. MM borrowed such funds and, under surveillance of and in cooperation with the FBI, paid the funds to LaFatch. Obviously, this cooperation placed a substantial burden on MM. The manifest injustice of any other result is clear.

The Court of Appeals decision accomplishes what

should be recognized as a rather pedestrian result in a situation which common sense indicates should have only one result. Substantial public interest in the issue would exist only if the contrary result had been reached.

As noted by Professor Moore and cited by the Court below:

> "Although, on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding public policy or resulted in manifest injustice to a party." (Footnotes omitted.) IB J. Moore, Federal Practice, ¶0.405[11] (1974).

The court below, consistent with this Court's position on res judicata as manifested in *Fall v. Eastin, supra,* found such overriding considerations present in the instant case.

Because the court below found that the state court never had jurisdiction to determine ownership of the res in custody of the District Court, the state court action and the federal court action must not have involved the same issues. The balancing of res judicata and public policy is particularly apposite in the analysis of precisely what issues were litigated in a prior action, as was expressed in *Dore v. Kleppa,* 522 F.2d 1369 (5th Cir. 1975) in this way:

> "This Court has recently discussed at length the problems of deciding whether the cause of action in one suit is identical to that in another [citations omitted]...In making this decision, it should be remembered that res judicata is a principle of

public policy and should be applied so as to give rather than deny justice..."

Of the same effect is *Smith v. Pittsburgh Gage and Supply Co., supra.*

Indeed, no other conclusion as to the effect of the state court's decision is understandable. In awarding compensation of Fifteen Thousand Dollars ($15,000.00) the state trial court clearly did not purport to assert jurisdiction over the fund in control of the federal court. Rather, the state court merely awarded compensation as a result of the fraudulent misuse of the fund perpetrated by the criminal defendant. The jury verdict consisted of an award of additional compensation. The trial judge subsequently declined to place a constructive trust on the Fifty Thousand Dollar ($50,000.00) fund pending its release. Petitioner would have the Court believe that the trial court purported to order the release of the fund to the criminal defendant when it in fact found him liable for fraud, thus imposing an award of Fifteen Thousand Dollars ($15,000.00) independently of whatever action was to be taken in disposition of the fund. If the doctrine of res judicata were applied to the state court decision as argued by petitioner the result would be a division of the Fifty Thousand Dollar ($50,000.00) fund: Fifteen Thousand Dollars ($15,000.00) to MM Corporation and Thirty-five Thousand Dollars ($35,000.00) to LaFatch. There is no logic in such a result.

CONCLUSION

For these reasons, petitioner's request for issuance of a writ of certiorari to review the holding of the United States Sixth Circuit Court of Appeals should be denied.

Respectfully submitted,

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March 15, 1978

APPENDIX

COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

VERDICT FOR PLAINTIFF

September TERM 1975

John W. Vogel, et al.
Plaintiff

vs.

Anthony LaFatch
Defendant

Case No. 74CV-04-1149
CIVIL ACTION

We the jury, being duly impaneled and sworn, find the issues in this case on the Complaint in favor of the Plaintiff, M.M. Corporation and assess the amount of the recovery due to the Plaintiff, M.M. Corporation from the Defendant at the sum of $15,000.00 Dollars Compensatory and None [sic] Dollars Punitive Damages

And we do so render our verdict upon the concurrence of 6 members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 24 day of November, 1975.

1. Douglas E. (illegible)
2. Billie D. Williams, Jr.
3. (illegible)
4. (illegible)
5. Madalyn P. Kuntz
6. Judith C. DeVit
7.
8.

Verdict for Plaintiff
SEAL
9th June, 1976
(illegible)